IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-768

GEORGE RIOS, *et al.*,

Petitioners,

—v.—

ENTERPRISE ASSOCIATION STEAMFITTERS, LOCAL NO. 638 OF U.A., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT JOINT STEAMFITTING APPRENTICESHIP COMMITTEE IN OPPOSITION

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Citations

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Opinions Below

The relevant opinions below are adequately set forth in the Appendix to the Petition.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented

Did the district court, as the court of appeals found, act appropriately within its discretion in denying back pay to unskilled applicants to an apprenticeship program who failed standardized aptitude tests selected in good faith reliance on the opinion of experts and without discriminatory intent?

Statutory Provision Involved

The relevant statutory provision, 42 U.S.C. § 2000e-5(g), is set forth in the Petition.

Statement of the Case

On February 26, 1971, Petitioners filed a class action alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (the "Act"). Respondent Joint Steamfitting Apprenticeship Committee of the Steamfitters Industry Educational Fund ("JAC") is a joint labor-management committee which supervises the selection and training of apprentices in the steamfitting industry within the jurisdiction of Respondent Enterprise Association Steamfitters, Local No. 638 of U.A. ("Local 638"). The JAC is itself not an employer, and employs no apprentices. It consists of eight members, all of whom are appointed by the Trustees of the Steamfitters Industry Educational Fund (the "Educational Fund"). The Educational Fund was created by a 1960 Declaration of Trust pursuant to which four of its Trustees are appointed by Local 638 and four by Respondent Mechanical Contractors Association of New York, Inc. ("MCA"). Neither the Educational Fund nor its Trustees were named as defendants in the instant litigation.

The sole source of funds for the Educational Fund, and accordingly for the JAC apprentice program, is payments made by the some 300 contractors who employ steamfitters pursuant to a collective bargaining agreement with Local 638. These payments to the Educational Fund are fixed by the collective bargaining agreements between these employers and Local 638. At the time of trial, the collective bargaining agreement, the effective dates of which were October 2, 1972 through June 30, 1975, required each employer to pay to the Educational Fund five cents (5¢) per hour for each hour worked by journeymen and apprentice steamfitters.

The present collective bargaining agreement, which runs through June 30, 1978, requires a payment of seven cents (7¢) per hour to the Educational Fund for each hour worked. As a necessary consequence of the severe unemployment in the construction trades in the New York City area in recent years, hours worked and accordingly contributions to the Educational Fund have greatly diminished.

Following consolidation of this case with a suit filed by the United States against Local 638 and the JAC, trial was held before the Honorable Dudley B. Bonsal, United States District Judge. On June 21, 1973, Judge Bonsal entered an Opinion (App. pp. 34ff.)* which found, *inter alia*, that certain competitive written aptitude examinations which

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* "App." signifies the Appendix to the Petition for a Writ of Certiorari filed herein.

the JAC had used in the selection of apprentices from 1964 until 1971 had a differential impact on non-whites and could not "be considered job related, notwithstanding the difficulty of devising a fair test or of testing it [sic] for validity" (App. p. 58).

These examinations, the impact of which is the sole basis for the finding that the JAC violated the Act, were selected initially with the advice of New York University and the Stevens Institute of Technology. Moreover, as the district court noted, the apprenticeship program was designed in consultation with the United Association and the Mechanical Contractors Association of America and was registered with the United States and New York State Departments of Labor. There was no evidence that the JAC, either in its administration and grading of the examination or in the oral interviews of potential apprentices, had in any way intended to, or did, discriminate against non-whites.

Because of the unavailability of tests validated for steamfitters in accordance with the Equal Employment Opportunity Commission Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 *et seq.*, and given the fact that the JAC itself lacked the financial resources to undertake a costly validation study, Judge Bonsal approved for use by the JAC the General Aptitude Test Battery ("GATB") of the United States Training and Employment Service which, though not fully validated, had not been proven to have a differential impact on non-whites.

Indeed, Judge Bonsal, on June 21, 1973, ordered far-ranging remedial relief for Petitioners with regard to the apprenticeship program (App. pp. 69-81), including:

(i) Use of the GATB;

(ii) Mandatory indenturing by the JAC, during 1973, of a minimum of 400 apprentices, of whom 175 shall be white, thereby doubling the size of the apprenticeship program;

(iii) Mandatory indenturing of at least 30% non-whites in each year for the years 1973-1977;

(iv) An increase in the maximum age for applicants to the JAC training program from 24 to 30, so that any person who failed the examination between 1967 and 1971 would have full opportunity to apply again for admission; and

(v) Appointment of an Administrator, at the expense of all defendants, including the JAC, to implement and supervise the performance of the remedial program.

Judge Bonsal, however, reserved decision at that time on the issue of back pay.

Two years later, after implementation and supervision of this far-ranging remedial program, Judge Bonsal, in the exercise of the clear discretion given him under Title VII, denied back pay in behalf of unskilled persons denied admission to the apprenticeship program. The Court noted that "equitable considerations," including the speculative nature of any alleged injury to the class and the reliance by the JAC on the recommendation of experts, including the United States and New York State Departments of Labor, militated heavily against imposing back pay awards against the JAC (App. pp. 3-4).

Petitioners sought review of this aspect of Judge Bonsal's relief (as well as other facets of the opinion not presented in the Petition). The court of appeals affirmed the denial of back pay to unsuccessful apprentice applicants, relying on the lower court's intimate knowledge of the litigation and institution of the remedial program, and finding specifically that Judge Bonsal had not abused his discretion in denying back pay relief to this group (App. pp. 20-21).

REASONS FOR DENYING THE WRIT

The Denial of Back Pay Is Consonant With, and Appropriate Under, the Controlling Statutory Provision and Decisions of This Court.

The decision of the court of appeals is an appropriate and correct application of the relevant standards set forth in Title VII of the Act, as construed by this Court and the various courts of appeals. Petitioners have not only had extensive and careful consideration given to the issues by the district judge, but have also had a full and fair hearing before the court of appeals on the propriety of the lower court's exercise of remedial discretion, which the appellate court expressly found "was not abused in this instance" (App. p. 21).

Under the applicable statutory provision, 42 U.S.C. § 2000e-5(g), this Court has made it clear:

> It is true that back pay is not an automatic or mandatory remedy; like all other remedies under the Act, it is one which the courts "may" invoke. The scheme implicitly recognizes that there may be cases calling for one remedy but not another, and—owing to the structure of the federal judiciary—these choices are, of course, left in the first instance to the district courts. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 416-17 (1975).

The express language of the back pay provision of Title VII is itself couched in terms which point directly to the discretion of the trial court, stemming from its closeness to the controversy and its appreciation of the overall context in which claims for back pay are made. Here, Judge Bonsal not only had the opportunity to observe this matter from his perspective as trial judge, but in addition closely supervised the Affirmation Action Program for almost three years after trial and before his back pay decision. Under such circumstances, his exercise of discretion is surely to be afforded great weight.

Petitioners contend that the decisions of both the district court and the court of appeals in the instant case "are directly contrary to this Court's ruling" in *Albemarle Paper Co., supra* (Pet. p. 14).* *Albemarle,* however, held only that the district court's conceded discretion may not be "unfettered by meaningful standards or shielded from thorough appellate review," and that it is inappropriate, given the purposes of Title VII, to "condition the awarding of back pay on a showing of 'bad faith'." *Id.* at 416, 423. *Albemarle,* then, held only that "under Title VII, the mere absence of bad faith . . . does not depress the scales in the employer's favor." *Id.* at 422. *Rios,* unlike *Albemarle,* involved not a "mere absence of bad faith," but actual "good

*"Pet." signifies the Petition for a Writ of Certiorari filed herein.

faith [reliance] on the recommendation of experts" (App. p. 4). Petitioners' position that good faith may never influence the exercise of the trial court's discretion is not supported by either this Court's decision in *Albemarle* or by the explicit language of § 2000e-5(g), *supra*. As Justice Rehnquist noted in *Albemarle*:

> I do not read the Court's opinion to say, however, that the facts upon which the District Court based its conclusion . . . would not have supported a finding that the conduct of Albemarle was reasonable under the circumstances as well as simply being in good faith. Nor do I read the Court's opinion to say that such a combination of factors might not, in appropriate circumstances, be an adequate basis for denial of back pay. *Id.* at 444 (concurring opinion).

Petitioners' position that a defendant's good faith may *never* influence the exercise of the trial court's discretion is clearly at odds both with the express statutory language of § 2000e-5(g) and with the relevant decisions of this Court. Title VII provides that a back pay award "may" be made in the case of a defendant, if "appropriate," who has "*intentionally* engaged in or is *intentionally* engaging in an unlawful employment practice." Petitioners apparently take this Court's holding in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), to mean that, so long as an act or omission is discriminatory in impact, no inquiry into the *bona fides* of a defendant is appropriate. But *Griggs* involved § 703(h) of the Act (42 U.S.C. § 2000e-2(h)) which, as this Court noted, speaks of ability tests that are "designed, intended or *used* to discriminate because of race . . . " *Griggs, supra,* 401 U.S. at 433 (Court's emphasis). Respondent does

not suggest that its good faith precludes a finding of *liability* for violation of the Act, but rather states only that good faith may be relevant to the issue of appropriate remedy, since the affirmative presence of good faith, as Justice Rehnquist recognized, may be relevant to "a finding that the conduct of [the defendant] was reasonable under the circumstances." *Albemarle, supra,* 422 U.S. at 444.* To remove altogether from the scope of the lower court's discretion the presence of a defendant's good faith would therefore run afoul of the clear statutory language and judicial exegesis of Title VII.

Respondent's good faith reliance on experts is particularly significant where, as here, liability rests solely on disproportionate impact of testing performance and not on any purposefully discriminatory acts by Respondent. "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." *Washington* v. *Davis,* 426 U.S. 229, 242 (1976). See also *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* —— U.S. ——, 45 U.S.L.W. 4073 (1976). Although both *Washington* v. *Davis* and *Village of Arlington Heights* were decided upon constitutional grounds, "the similarities between the congressional language [of Title VII] and some of those decisions [construing the Equal Protection Clause] surely indicates that the latter are a useful starting point in interpreting the former." *General Electric Co.* v. *Gilbert,* —— U.S. ——, 97 S.Ct. 401 at 407 (1976).

Moreover, a back pay award against the JAC, given its limited financial resources, would severely damage the

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* Plaintiffs who are able to show discriminatory impact of ability tests where the defendant's conduct was "reasonable under the circumstances" would not be left without remedy; the use of the offending test could surely be enjoined.

JAC's ability to conduct the remedial program ordered by Judge Bonsal. Indeed, because the JAC is not an "employer, employment agency, or labor organization," an award against it would be outside the statute's scope and therefore inappropriate.*

In essence, then, Judge Bonsal's denial of back pay was well within the boundaries of equitable discretion established by this Court in *Albemarle, supra.* To hold otherwise would strip trial courts altogether of the residual discretion which Congress recognized was necessary to insure a full and fair implementation of Title VII in accordance with "principles of equity." *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1382 (5th Cir. 1974).

Equally incorrect is Petitioners' contention that the decisions of the district court and court of appeals "misallocate[d] the burden of proof and cannot be reconciled with the applicable decisions of this Court . . ." (Pet. p. 20). In fact, neither the court of appeals nor the district court spoke to the allocation of the burden of proof. Instead, the district court found that the speculative nature of alleged economic injury, when combined with the JAC's reliance on the registration of its tests with the United States and New York State Departments of Labor, constituted sufficient "equitable considerations" militating against any award of back pay (App. p. 4). The court of appeals, in affirming the trial court's exercise of discretion, similarly pointed to the remoteness of the alleged injury to the unsuccessful apprentice applicants as a factor appropriately considered by the district court in fashioning appropriate equitable relief (App. pp. 20-21).

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* Compare 42 U.S.C. § 2000e-5(b) with 42 U.S.C. § 2000e-5(g).

Moreover, it is clear that where, as here, "injury is too remote" and, with regard to the class generally, "damages suffered by them [are] altogether too speculative" (App. p. 21), back pay may be denied on a class-wide basis.

As the court of appeals noted in *United Transportation Union Local No. 974* v. *Norfolk and Western Ry.,* 532 F.2d 336, 341 (4th Cir. 1975), *cert. denied,* —— U.S. ——, 96 S.Ct. 1664 (1976), even in the class action context, "to justify an award [of back pay] plaintiffs must prove that there is a class whose members suffered economic loss as a result of discrimination." Where, as here, alleged economic damage is so speculative as to render such proof impossible, the trial court is well within the appropriate bounds of its discretion in finding that a back pay award is not "appropriate" under Title VII. Petitioners' reliance on *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747 (1976), is misplaced. That case involved the appropriate standards in granting an award of retroactive *seniority,* a remedy which is "far less drastic for a defendant to be required to bear than back pay." *EEOC* v. *Local 638 . . . Local 28 of the Sheet Metal Workers' International Ass'n,* 532 F.2d 821, 833 n. 6 (2d Cir. 1976). Moreover, *Franks* involved proven discriminatory practices in the hiring, transfer and discharge of employees, rather than in admission to an apprenticeship program a full step removed from the actual employment process.

As a consequence, the district court and court of appeals appropriately considered the speculative nature of the alleged injury to the class in denying back pay.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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